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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

CHONG YUK WAH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Chong Yuk Wah, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit which affirmed a judgment of the United States District Court for the District of Massachusetts convicting petitioner of violating 8 U.S.C. 1326.

OPINIONS BELOW

The District Court rendered no opinion. Its judgment was filed on February 14, 1972, and is set forth as

Appendix A. A Memorandum and Order of the Court of Appeals is unreported and was filed on April 26, 1972. It directed affirmance of the District Court judgment (Appendix B).

JURISDICTION

The judgment of the Court below was entered on April 26, 1972. The jurisdiction of this Court is conferred by 28 U.S.C. 1254(i).

QUESTIONS PRESENTED

The petitioner, a naturalized citizen of Canada, after being deported to Canada by the Immigration and Naturalization Service thereafter, without permission reentered the United States in 1962 and remained in the United States without attempting to secrete himself. It was not until some eight years subsequent to such reentry that the petitioner on September 29, 1970, voluntarily appeared before the Immigration and Naturalization Service and surrendered himself.

On December 10, 1971, the Government filed an indictment charging petitioner with the crime of violating 8 U.S.C. 1326.

Accordingly, there are presented the following issues:

1. Whether under the uncontroverted facts the petitioner, who, after being deported to Canada, reentered the United States in April, 1962, without permission and without in anywise attempting to secrete himself, had, within the purview of 8 U.S.C. 1326, committed all the elements of a crime under said section in April, 1962, at the time of his reentry into the United States.

2. Whether in the light of *Toussie v. United States*, 397 U.S. 112 (1970), and *United States v. Cores*, 356

U.S. 405 (1968), the crime of being found within the United States after deportation, contrary to 8 U.S.C. 1326, is a continuing crime and incomplete until the petitioner is apprehended or discovered.

3. Whether the conviction of the petitioner for violating 8 U.S.C. 1326 should be reversed pursuant to the provisions of 18 U.S.C. 3282, because the indictment charging petitioner with the crime of violating 8 U.S.C. 1326 was not "found * * * within five years next after such offense [of reentry] shall have been committed".

STATEMENT OF THE CASE

Petitioner, a native of China and a naturalized Canadian citizen, was deported from the United States on March 12, 1962. Within thirty days thereafter he illegally returned to the United States without permission of the Attorney General and thereafter remained here without interruption. The Government admits that it is unable to rebut petitioner's contention set forth in his affidavit of January 10, 1972, that he had not secreted himself or been in hiding after his return here. Petitioner voluntarily appeared at the Immigration and Naturalization Service in Boston on September 29, 1970. [Deportation proceedings were then instituted against petitioner pursuant to 8 U.S.C. 1251(a)(1) and he has a pending application for permanent residence under 8 U.S.C. 1254(a)(1).]

On December 10, 1971, petitioner was indicted for violation of 8 U.S.C. 1326. It was alleged that petitioner was found in Boston on September 29, 1970, after deportation and without obtaining permission prior to reentry. The facts were the subject of a stipulation and petitioner waived a jury trial.

Petitioner moved to dismiss the indictment upon the basis of the statute of limitations and upon the ground that the term "found" was unconstitutionally vague.

The District Court overruled these motions and found petitioner guilty and on February 4, 1972, gave him a two year suspended sentence conditioned upon his compliance with orders of the Immigration and Naturalization Service. On appeal to the Circuit Court of Appeals the judgment was summarily affirmed in a Memorandum and Order holding that the violation herein was clearly a continuing offense. The Court of Appeals stated:

> " 'Found' does imply a continuing offense. If an alien is deported and illegally returns, there is no necessary reason to allow him to remain forever, by some process of prescriptive rights, because the Government had not sooner discovered him."

STATUTES INVOLVED

Section 276 of the Immigration and Nationality Act (8 U.S.C. 1326) provides in part:

> "REENTRY OF DEPORTED ALIEN
>
> "Sec. 276. Any alien who–
>
> (1) has been arrested and deported or excluded and deported, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission * * * shall be guilty of a felony, and upon conviction thereof, be punished by

imprisonment of not more than two years, or by a fine of not more than $1,000, or both."

18 U.S.C. 3282 provides:

"Except as otherwise provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

Section 212(a) of the Immigration and Nationality Act [8 U.S.C. 1182(a)] provides for the exclusion of:

"(17) aliens who have been arrested and deported * * *."

Section 241(a) provides for the deportation of aliens who:

"(1) at the time of entry was within one or more classes of aliens excludable by the law existing at the time of such entry."

REASONS FOR GRANTING THE WRIT OF CERTIORARI

In holding that 8 U.S.C. 1326 is a continuing offense and that petitioner's offense in 1962 was not barred by the five year statute of limitations, the Court of Appeals has decided an important and recurring question of federal law which has not been, but should be, settled by this Court. The decision below is in conflict with the views expressed by this Court in *Toussie v. United States*, 397 U.S. 112 (1970), and *United States v. Cores*, 356 U.S. 405 (1968). It is contrary to the representations made to this Court by the Solicitor General in *United*

States v. Cores, supra, that reentry violations are not continuing offenses and that: "It would take some special clause to make an 'entry' offense continuing". The decision below is contrary to the views of other Circuits which do not regard entry crimes as continuing offenses, *United States v. Vasilatos*, 209 F.2d 195 (3rd Cir., 1964). The view expressed below that unless the offense be declared a continuing one petitioner would be allowed "to remain forever, by some process of prescriptive rights", is erroneous, overlooks the provision (without any statute of limitations) for the deportation of aliens who reenter illegally, 8 U.S.C. 1182(a)(17), 1241(a)(1); and *United States v. Ramirez-Aguilar*, 455 F.2d 486 (9th Cir., 1972).

Numerically, crimes involving the immigration and nationality laws constitute the most frequent violations of federal law. During the years 1962-1971, there were 43,840 prosecutions for immigration and nationality violations. There were 9,939 convictions for illegal entries and 14,724 for reentries of deported aliens. In each of the past ten years convictions for reentries of deported aliens have always exceeded 1,000 per year. (1971 Annual Report, Immigration and Naturalization Service, pp. 117-118; Annual Report of the Director of the Administrative Office of the United States for Fiscal 1971 p. 321). With this volume of prosecutions, it is important that the applicability of the statute of limitations to these violations be definitively settled.

Petitioner is charged with illegal reentry contrary to 8 U.S.C. 1326 after deportation in 1962. He returned in the same year, 1962. The indictment was filed on December 10, 1971.

Whether the instant indictment is barred by a five year statute of limitations depends on whether the offense was complete in 1962 when petitioner returned. 18

U.S.C. 3282 provides a five year statute of limitations for noncapital offenses, including violations of 8 U.S.C. 1326. Petitioner's alleged illegal reentry occurred in 1962 shortly after his deportation in that year. The alleged offense was then complete. Unless the offense is a continuing one, it is clearly barred by the five year statute of limitations.

1. The legislative history of 8 U.S.C. 1326 indicates that the gist of the offense sought to be punished there is reentry to the United States of aliens who have been previously deported or excluded and who have not obtained permission of the Attorney General to return to this country.

The present statutory provision originated in the Act of March 4, 1929, 45 Stat. 1551, 8 U.S.C. 180. The statute then forbade the entry or an attempt to enter by aliens who had been arrested and deported. Section 22 of the Internal Security Act added those aliens who had been excluded and deported. 64 Stat. 1006, 8 U.S.C. 180.

The enactment of the Immigration and Nationality Act of 1952, was preceded by a three year investigation and study of prior immigration and nationality laws. See *H. Rep. 1365*, 82nd Cong., 2nd Sess., p. 27. In the original bill, which as ultimately revised, was enacted into law (S. 3455, 81st Cong., Section 276), only entry and attempts to enter on the part of aliens who had been arrested and deported were made offenses. Thereafter, the Department of Justice submitted an analysis of the bill and proposed changes. *H. Rep. 1365, supra*, p. 28. S. 716 in the 82nd Congress evolved from those proposals. That bill for the first time made it a felony for proscribed aliens to be "found at any time in the United States."

The following excerpt from the Analysis of S. 3455, 81st Cong., prepared by the General Counsel of the

Immigration and Naturalization Service, indicates the reason for this special provision regarding the crime of illegal entry in 8 U.S.C. 1326 (p. 276-2):

> "The Service also wishes to urge that section 276 be broadened so as specifically to make it a criminal offense for a person to be found in the United States after his arrest and deportation or after his exclusion and deportation, unless consent for his reapplying has been granted and he has been legally admitted. This recommendation is based upon the fact that litigation now pending indicates the possibility that this section 1 of the 1929 Act may be inadequate to permit prosecution of a deported alien who is found in the United States after deportation and in whose case it is not possible to establish the place of his entry. In the pending case it is possible to show that the alien has been deported, that he has not been granted permission to reapply, and that he is at present in the United States. *However, it is not possible to establish the place of his entry.* An attempt is being made to defeat his prosecution under Section 1 of the Act of March 4, 1929 on the ground that the proper venue for the suit cannot be established. The Government will attempt, among other things, to urge that a violation of section 1 of the 1929 Act is a continuing offense within the meaning of 18 U.S.C. 3237, but it cannot be known at this time, of course, whether we will be successful in so urging. *It would appear that if this section is broadened so as specifically to make it an offense for the alien to be found in the United States, the possible loophole in the present statute will be overcome.*" (Emphasis supplied.)

In explanation of the provision, "found at any time in the United States" Deputy Attorney General Peyton Ford advised the Senate Judiciary Committee in a letter on May 14, 1951:

> "Section 276: This section is designed to replace provisions now found in existing law with respect to criminal offenses which will be committed if a previously deported alien returns to the United States. It adds to existing law by creating a crime which will be committed if a previously deported alien is subsequently found in the United States. This change would overcome inadequacies in existing law which have been observed in those cases in which it is not possible for the Immigration and Naturalization Service to establish *the place of reentry, and hence the proper venue,* arising in prosecutions against a deported alien under the 1929 Act." (Emphasis supplied.) Revision of Immigration, Naturalization, and Nationality Laws, Joint Hearings on S. 716, H.R. 2379, and H.R. 2816, Subcommittees of the Committees on the Judiciary, 82nd Cong., 1st Sess., p. 716.

No greater importance was imputed to the change by either the House Judiciary Committee or the Senate Judiciary Committee when the legislation was reported to their respective houses. Each committee report stated in reference to Section 276 only that "criminal sanctions are provided * * * for reentry to certain deported aliens." *H. Rep. 1365, supra,* p. 68; *S. Rep. 1137,* 82nd Cong., 2nd Sess., p. 37.

The legislative history of 8 U.S.C. 1326 thus establishes that the sole purpose of the phrase "is at any time found in the United States" was to overcome the inadequacies in existing law * * * in those cases in which it is not possible for the Immigration and Naturalization Service to establish the places of entry, and hence the proper venue* * *"

2. Although the word "found" can mean "discovered" or "apprehended" (*United States v. Provoo,* 215 F.2d

531, 537 (2d Cir. 1954)) or "brought" as in 18 U.S.C. 3282, it had a widely accepted meaning of presence within the jurisdiction at the time of the enactment of the 1952 Immigration and Nationality Act.

The word "found" means present within the jurisdiction in antitrust legislation, 15 U.S.C. 15, 22; *Thill Securities Corp. v. N.Y. Stock Exchange,* 283 F. Supp. 239, 244-5 (E.D. Wisc. 1968); *Westor Theatres Inc. v. Warner Bros. Pictures,* 41 F. Supp. 757, 760 (D. N.J. 1941); in litigation under the Interstate Commerce Act, 49 U.S.C. 9; *Sonken-Galamba Corp. v. Atchison T. & S.F. Ry. Co.,* 27 F. Supp. 902 (W.D. Mo. 1939); in suits for copyright infringement, 28 U.S.C. 1400(a); *Geo-Physical Maps Inc. v. Toycraft Corp.,* 162 F. Supp. 141, 146 (S.D. N.Y. 1958); in disputes under the Housing Rent Act of 1947 as amended, 50 U.S.C. 1896(c); *Fancher v. Clark,* 127 F. Supp. 452 (D. Colo. 1954); in suits for penalties and forfeitures, 28 U.S.C. 1395; in litigation under the tort claims statute, 28 U.S.C. 1402b; *Abromovitch v. U.S. Lines,* 174 F. Supp. 587 (S.D. N.Y. 1959); and in litigation under the Securities Act of 1933 (15 U.S.C. 77v) and under the Securities Act of 1934 (15 U.S.C. 78(a)(a)). See also: *Freeman v. Bee Machines Co.,* 319 U.S. 448, 454, 461 (1943) and *Black's Law Dictionary,* Rev. 4th Ed. The word "found" has a similar meaning in state statutes. *Central Loan & T. Co. v. Campbell Commission,* 173 U.S. 84 (1899), Organic Act of Oklahoma; *N.Y.L.E. & W.R. Co. v. Estill,* 147 U.S. 591 (1892), Missouri statute.

It is presumed in the absence of a contrary indication, that Congress used the word "found" in 1952 in conformity with the definition of the word as defined by the courts. *Standard Oil v. United States,* 221 U.S. 1, 45

(1910). "The Congressional intent is disclosed by the contemporaneous use of the same expression in a related statute." *Boone v. United States*, 235 F.2d 939 (4th Cir., 1956). And, wherever possible, words are interpreted and given their ordinary meaning. *De Ganay v. Lederer*, 250 U.S. 376 (1919). The contemporaneous use of "found" and its ordinary meaning was presence within the jurisdiction as noted above.

One of two reported cases analyzing the meaning of "found" in 8 U.S.C. 1326 is *United States v. Alvarado-Soto*, 120 F. Supp. 848 (S.D. Cal. 1954), which concluded that: "A plain reading of this statute readily discloses that the conduct which it punishes is an illegal presence in the United States after having been once excluded and deported." See also: *United States v. Bruno*, 328 F. Supp. 815 (W.D. Mo. 1971). There will be discussed below the validity of the conclusion of the *Alvarado-Soto* case that the offense is a continuing one. In *United States v. Trott*, 227 F. Supp. 448 (D. Md. 1964), the Court stated:

> "The word 'found' as used in the statute necessarily implies a reentry, open or surreptitious."

Were "found" to mean apprehend or arrest it would incorporate into the criminal statute a subsequent event unconnected with the conduct of a defendant.

Such an offense has long been proscribed. In *United States v. Fox*, 95 U.S. 670, 671 (1877), in striking down a statute relating to the bankruptcy laws, the Supreme Court held:

> "* * * An act which is not an offense when it is committed cannot become such by any subsequent independent act of the party with which it has no connection. By the clause in question, the obtaining of goods on credit upon false pretenses

> is made an offense against the United States, upon the happening of a subsequent event, not perhaps in the contemplation of the party, and which may be brought about, against his will, by the agency of another. The criminal intent essential to the commission of a public offense must exist when the act complained of is done: it cannot be imputed to a party from a subsequent independent transaction."

See also: *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1938), which invalidated a statute upon the ground that it "condemns no act or omission" on the part of the persons brought within its coverage, and *Terry v. United States*, 131 F.2d 40, 45 (8th Cir., 1942).

3. The statutory language of the 1952 Immigration and Nationality Act reinforces the conclusion that "found" means presence within the jurisdiction of the United States rather than apprehension or arrest.

8 U.S.C. 1182(a)(17) provides for the exclusion of aliens who have been "arrested and deported." 8 U.S.C. 1252 provides for the "Apprehension and deportation of aliens" and that they may be "arrested and taken into custody." 8 U.S.C. 1282(b) authorizes the Attorney General to take an alien crewman into custody." 8 U.S.C. 1357(a)(2) and (4) grants authority to immigration officials to "arrest" aliens.

8 U.S.C. 1329 authorizes prosecutions and civil litigation in the United States District Courts:

> "at any place in the United States at which the violation may occur or at which the person charged with a violation under section 275 or 276 (8 U.S.C. 1325 or 1326) may be apprehended."

Significantly, 8 U.S.C. 1329 replaced 8 U.S.C.A. 164 (repealed in 1952) and replaced the words "may be

found" with "may be apprehended". It is thus clear that Congress did not utilize "found," "arrest" or "apprehend" interchangeably. The presence of the phrase "is at any time found in the United States" in one part of the statute and its absence in the other, as Justice Holmes said in *United States v. Atchison T. & S.F.R. Co.*, 220 U.S. 37 (1910) "is an argument against reading it as implied * * * We see no reason to suppose that Congress meant more than it said."

We submit therefore that "found" in 8 U.S.C. 1326 was intended to dispense with proof of the place of reentry and that it means mere presence within the jurisdiction of the United States after entry.

4. Criminal violations of the immigration act regulating the entry of aliens have not been regarded as continuing crimes. *Cf. Lazarescu v. United States*, 199 F.2d 898 (1st Cir., 1952); *United States v. Vasilatos*, 209 F.2d 195 (3rd Cir., 1964) fradulently procuring entry into this country after prior deportation; *United States v. Capella*, 169 Fed. 890 (N.D. Cal. 1909) bringing an unaccompanied minor into the country; *United States v. Lair*, 177 Fed. 789 (D. Kan. 1910) reversed on other grounds, 195 Fed. 47, cert. denied 229 U.S. 609; *United States v. Lavoie*, 182 Fed. 943 (W.D. Wash. 1910) importation of female for immoral purposes. This rule is apparently recognized in 8 U.S.C. 1329 wherein venue for all immigration crimes is placed in the district of violation except in cases of entry at times or places not designated, fraudulent entry and entry after deportation which offenses may be tried in the district of apprehension. If reentry crimes were continuous, it would have been superfluous to provide that venue lies in the district of apprehension.

In *United States v. Cores*, 356 U.S. 405 (1968), this Court was urged to hold that 8 U.S.C. 1282 (alien

crewman willfully remaining) was a continuing offense for venue purposes. The Government in its Supreme Court brief acknowledged that reentry violations contrary to 8 U.S.C. 1326 were not continuing offenses. It stated at page 28:

> "The finality of an 'entry' is plain once the act of 'entry' has been accomplished. It would take some special clause to make an 'entry' offense continuing."

This Court agreed, stating at 356 U.S. 408, note 6:

> "The offense here is unlike crimes of illegal entry set out in §§ 275 and 276 of the Act. 66 Stat. 229, 8 U.S.C. §§ 1325, 1326. *Those offenses are not continuing ones, as 'entry' is limited to a particular locality and hardly suggests continuity.* Hence, a specific venue provision in § 279 of the Act was required before illegal entry cases could be prosecuted at the place of apprehension. 66 Stat. 230, 8 U.S.C. § 1329. This reasoning underlay the request for specific legislation by the Immigration and Naturalization Service. See Analysis of § 3455, 81st Cong., p. 276-7. In contrast to illegal entry, the 252(c) offense of willfully remaining is continuing in nature." (Emphasis supplied.)

Significantly, *Cores* was decided with full awareness of *United States v. Alvarado-Soto*, 120 F. Supp. 848 (D.C. Calif., 1954), and must be deemed to reject its brief holding that 8 U.S.C. 1326 is a continuing offense.

This conclusion is supported by *Yates v. United States*, 354 U.S. 298 (1957), refusing to give the term "organize" a continuing offense meaning since criminal statutes should be narrowly construed. It was there held that the term "organize" can only refer to a single and initial activity of a defendant. Similarly, in *United States v. Provoo*, 215 F.2d 531, 537 (2nd Cir., 1954), the term

"found" was equated to the first apprehension or arrest of a defendant.

Finally, this matter should be completely set at rest by the Supreme Court's recent decision in *Toussie v. United States*, 397 U.S. 112 (1970), applying 18 U.S.C. 3282, and holding that failure to register under the draft is not a continuing offense. The Court in Toussie said:

(a) Criminal limitations statutes are to be liberally interpreted in favor of repose.

(b) Statutes of limitations normally begin to run when the crime is complete.

(c) Except in limited circumstances, a continuing offense should not be implied.

(d) When there is a choice between reading a crime as a single initial violation and as a continuing offense, the former is to be preferred.

(e) *United States v. Cores*, 356 U.S. 405 (1958), was a holding relating to venue.

Applying these touchstones it seems clear that the decision below is in conflict with the views of the Solicitor General in *Cores* which this Court accepted and approved. It is contrary to *United States v. Cores*, and *Toussie v. United States, supra*. It is in conflict with other circuits which do not regard crimes of entry as continuing offenses. *United States v. Vasilatos*, 209 F.2d 195 (3rd Cir., 1964). Illegal reentry "hardly suggests continuity" and is not a continuing offense. The alleged offense herein was complete in 1962 when petitioner returned. The prosecution herein is, accordingly, barred by the five-year statute of limitations. The decision below is erroneous. The issue presented is a recurring one in the administration of the immigration laws and the prosecution of federal offenses. It should be finally resolved by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

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APPENDIX A

Judgment and Order of Probation
(Revised Dec. '66)

Cr. Form No. 101

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v. No. Criminal 71-676-F

CHONG YUK WAH

On this 14th day of February, 1972, came the attorney for the government and the defendant appeared in person, and with counsel.

It Is Adjudged that the defendant upon his plea of NOT GUILTY AND WITH A VERDICT OF GUILTY

has been convicted of the offense of Unlawfully being in the United States without having obtained permission from the Attorney General of the United States; In Violation of Title 8 U.S.C. Section 1326 as charged In an Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant Chong Yuk Wah be imprisoned for a term of two (2) years–Execution of prison sentence is suspended–Deft. Chong Yuk Wah is placed on Probation for a term of two (2) years –Condition of probation is that the defendant Chong Yuk Wah obey all lawful orders issued by the U.S. Immigration and Naturalization Service.

It is Further Ordered that during the period of probation the defendant shall conduct himself as a law-abiding, industrious citizen and observe such conditions of probation as the Court may prescribe. Otherwise the defendant may be brought before the court for a violation of the court's orders.

It is Further Ordered that the clerk deliver three certified copies of this judgment and order to the probation officer of this court, one of which shall be delivered to the defendant by the probation officer.

/s/ Francis J.W. Ford
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1045.

UNITED STATES OF AMERICA,
Appellee,

v.

CHONG YUK WAH, a/k/a
JACK SUN CHONG,
Defendant, Appellant.

Before ALDRICH, Chief Judge,
McENTEE and COFFIN, Circuit Judges.

MEMORANDUM AND ORDER
Entered April 26, 1972

We see no merit whatever in this appeal. Indeed, with due respect to counsel for appellant, his brief itself contains its own answers. The legislative history –appellant's brief, p. 6–shows that one reason for the present form of the statute was because the government feared that "entry," as distinguished from "being found,"

would not support a continuing offense. See, also, quotation from government brief in *United States v. Cores*, appellant's brief, p. 11.

"Found" does imply a continuing offense. If an alien is deported, and illegally returns, there is no necessary reason to allow him to remain forever, by some process of prescriptive rights, because the government had not sooner discovered him. At least Congress could properly wish to prevent such prescription. We hold it selected precisely the language to do so.

The judgment of the District Court is affirmed.

By the Court:

/s/ Dana M. Gallup
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1508

CHONG YUK WAH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of being found in the United States after deportation and without permission of the Attorney General, in violation of 8 U.S.C. 1326. On February 14, 1972, he was given a two years' suspended sentence and was placed on two years' probation. The court of appeals affirmed in a memorandum opinion (Pet. App. 1b-2b).

The stipulated evidence showed that petitioner was born in China and became a naturalized Canadian citizen on March 31, 1952. He was never a citizen of the United States. On January 11, 1962, petitioner was arrested in this country as an alien who had remained in this country without authority; he was deported to Canada on March 12, 1962. Within thirty days after his deportation, petitioner knowingly reentered the United States without having obtained the permission of the Attorney General and thereafter remained in this country. On September 29, 1970, petitioner surrendered himself to the Immigration and Naturalization Service in Boston, Massachusetts.

Prior to trial, petitioner moved to dismiss the indictment on the ground that the prosecution was barred by the statute of limitations. The district court denied the motion. The court of appeals affirmed the conviction, holding that, contrary to petitioner's contention, " '[f]ound' does imply a continuing offense" (Pet. App. 2b).

1. The statute applies to any alien who, having been previously arrested and deported or excluded and deported, commits one of three offenses: (1) illegally enters the United States; (2) attempts to so enter; or (3) "is at any time found in" the United States after his deportation. Petitioner was indicted for the third of these offenses and contends that the statute of limitations commenced to run on the date of his unlawful reentry in 1962 rather than the date his presence became known to the authorities in 1970.

Such an interpretation flouts the plain meaning of the statutory language and in effect repeals the "found in" clause, which was specifically added to the statute by Congress in 1952, by giving it the same meaning as the "enters" clause that was already in the statute.

Petitioner's ingenious arguments regarding the meaning of the word "found" (Pet. 9-12) cannot establish that petitioner was "found" on the date of his reentry, when in fact it is conceded that his reentry and his presence in the United States were unknown to governmental authorities until many years later.[1] And if we accept the petitioner's assertions that "found" refers to "presence," that does not advance his contention that the statute does not describe a continuing offense. Just as *United States* v. *Cores*, 356 U.S. 405, held that "remains" describes an offense that continues until the alien leaves the United States, being either "present" or "found" would similarly describe a continuing offense.

Much of the petitioner's argument rests on the assertion that the statutory word "enters" does not connote a continuing offense, and it is on that basis that he relies on *United States* v. *Cores*, *supra* at 408 n.6, which so stated.[2] We do not dispute this

[1] The statute of limitations is not without meaning as applied to the offense in question; it would presumably begin to run at the time that a deportee's presence in the United States becomes known to the appropriate governmental authority.

[2] The other cases cited in this connection by petitioner, such as *United States* v. *Vasilatos*, 209 F. 2d 195 (C.A. 3), also address themselves to "entry."

contention, but merely point out that the Court's discussion of "entry" is not relevant to the offense with which petitioner was charged, which has been read by at least two courts to entail a continuing offense. *United States* v. *Bruno*, 328 F. Supp. 815, 825 (W.D. Mo.); *United States* v. *Alvarado-Soto*, 120 F. Supp. 848, 850 (S.D. Cal.).

2. The legislative history of this plain language does not aid petitioner. It is true, as petitioner asserts (Pet. 7-9), that at the time of the enactment of 8 U.S.C. 1326 Congress was concerned with previously encountered venue problems in regard to the entry offense. But this is not to suggest that venue was the only concern. A basic aim of the Immigration and Naturalization Service, as set out in its statement to Congress, was also to broaden the coverage of the statute by adopting the "found in" language.[3]

In a similar vein, the Deputy Attorney General advised the Judiciary Committee as follows:

> Section 276 [8 U.S.C. 1326]: This section is designed to replace provisions now found in existing law with respect to criminal offenses which will be committed if a previously deported alien returns to the United States. It adds to existing law by creating a crime which will be committed if a previously deported alien is subsequently found in the United States. * * *[4]

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[3] Analysis by General Counsel, Immigration and Naturalization Service, of S. 3455—81st Cong., 2d Sess., p. 276-2.

[4] Joint Hearings on S. 716, H.R. 2379, and H.R. 2816, Subcommittees of the Committees on the Judiciary, 82d Cong., 1st Sess., p. 716.

These authoritative commentators obviously recognized that this new offense, by its precise language, "clearly contemplate[d] a prolonged course of conduct." *Toussie* v. *United States*, 397 U.S. 112, 120; see 2 Gordon and Rosenfield, *Immigration Law and Procedure* § 9.25 (1971). There is no suggestion that Congress viewed the matter any differently. Indeed, that this new statute was not enacted simply to allay a venue problem is underscored by the fact that Congress passed another provision (8 U.S.C. 1329) which takes care of the venue problems thought to exist with regard to the "enters" language of the statute.

3. *Toussie* v. *United States*, 397 U.S. 112, also relied upon by petitioner, does not help him. It held that failure to register for the draft, which by presidential proclamation was required to be done within five days of attaining the age of eighteen, was a completed offense after that point for statute of limitations purposes. There is nothing in such a requirement that on its face suggests a continuing offense, and the Court declined to construe a requirement that manifestly was to be performed by a specified date to impose, *sub silentio*, a continuing duty to register, the violation of which would constitute a continuing offense and would toll the statute of limitations. The *Toussie* statute is different on its face from the provision petitioner is charged with violating, which has no fixed chronological referrent, but which continues to be violated by petitioner's continuing unlawful presence in the United States. Unless the plain lan-

guage of the statute is cast aside, the statute of limitations cannot begin to run until a violator is "found in" the United States, which, in this case, occurred in December 1970.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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